* Together with No. 701, Hyman v. United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 30, 1965

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	10
Conclusion	18
Appendix (Court of Appeals Opinion)	1a

CITATIONS

CASES:

Calhoon v. Harvey, 379 U.S. 134	15
Cramer v. United States, 325 U.S. 1	17
Gilbert v. United States, 370 U.S. 650	15
Grin v. Shine, 187 U.S. 181	15, 16
Gurton v. Arons, 339 F. 2d 371 (C.A. 2)	11
Moore v. United States, 160 U.S. 268	15
Morissette v. United States, 342 U.S. 246	15
N.A.A.C.P. v. Button, 371 U.S. 415	14
New York Times Co. v. Sullivan, 376 U.S. 254	17
Smith v. California, 361 U.S. 147	14
United States v. Harmon, 339 F. 2d 354 (C.A. 6)	16
United States v. Northway, 120 U.S. 327	8, 16
United States v. Turley, 352 U.S. 407	16
Williams v. North Carolina, 317 U.S. 287	17
Yates v. United States, 354 U.S. 298	17

STATUTES AND LEGISLATIVE HISTORY:

Criminal Conspiracy Statute, 18 U.S.C. § 371	3, 15
Labor-Management Relations Act, § 7	13
Landrum-Griffin Act, §§ 201, 209	14, 15
Landrum-Griffin Act, § 501(a) and (b)	14
Landrum-Griffin Act § 501(c)	2, 8-12, 15, 16
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI	16

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The petitioner, Joseph Scalza, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on August 2, 1965.

OPINION BELOW

The opinion of the Court of Appeals, dated August 2, 1965, is not yet reported. It is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

Following a jury trial, the petitioner Scalza was found guilty on October 29, 1964, on a charge of conspiracy to violate § 501(c) of the Landrum-Griffin Act, in the United States District Court for the Southern District of New York. On November 6, 1964, he was sentenced to five years' imprisonment and fined $5000.

The Court of Appeals for the Second Circuit affirmed the judgment of conviction on August 2, 1965, and a timely petition for rehearing was denied on September 1, 1965. This petition for writ of certiorari is filed within 30 days following that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the use by a union officer of union-authorized increases in his salary and expense accounts for payment to others in connection with union merger negotiations constitutes an embezzlement, stealing, abstracting or conversion of union funds within the meaning of § 501(c) of the Landrum-Griffin Act.

STATUTORY PROVISIONS INVOLVED

Section 501(c), Labor Management Reporting and and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 501(c):

> Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

The general conspiracy statute, 18 U.S.C. § 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

The relevant facts, viewed in the light most favorable to the Government, may be summarized as follows:[1]

On June 16, 1964, an amended single-count indictment was filed, charging seven individual defendants with having engaged in a conspiracy to violate § 501(c) of the Landrum-Griffin Act. It was charged that the purpose of the conspiracy was to embezzle, steal, abstract and convert to their own use and to the use of others moneys and other assets of certain labor organizations, of which some of the defendants were officers or employees. These labor organizations were identified as Local 229 of the United Textile Workers of America (hereinafter called the Textile Local), its unaffiliated successor New York City District Council 77 (hereinafter called the Independent Local), and Local 819 of the International Brotherhood of Teamsters (hereinafter called the Teamsters Local). S. App. 15a.

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[1] The record references in this petition are symbolized as follows:

Tr.—Stenographic transcript of trial testimony.

S. App.—Petitioner Scalza's printed appendix in the court below.

Govt. App.—Government's printed appendix in the court below.

Basically, the alleged conspiracy was divided by the indictment into two separate parts. The first part, which entailed nearly three-fourths of the trial testimony, dealt with the activities of certain defendants in using fraudulent expense vouchers and payroll dummies to embezzle funds from the Textile Local and the Independent Local during the period of 1957 through 1961. See pars. 3 and 4 of the indictment, S. App. 16a. All of the money so acquired by these fraudulent devices allegedly was used personally by certain defendants other than the petitioner Scalza. Indeed, the Government made no claim and there is no evidence that the petitioner Scalza had anything whatever to do with the affairs of those two locals or with the embezzlements therefrom.

Significantly, the original indictment that had been filed on October 24, 1963, made no mention at all of the petitioner Scalza or of the affairs of the Teamsters Local.[3] Not until the amended indictment was filed on June 16, 1964, adding a fifth paragraph and two additional overt acts, was petitioner Scalza in any way charged with being involved in the alleged conspiracy. Almost as an afterthought, the new fifth paragraph of the amended indictment alleged that, quite apart from the original and renewed charges involving embezzlements from the Textile Local and the Independent Local,

> It was further a part of said conspiracy that moneys from the treasury of a labor organization,

[3] Based upon testimony given before a grand jury, Scalza had been indicted for perjury in denying that he had in fact collected for and paid money to one Burton Hyman after or in connection with the merger of the Independent Local with the Teamsters Local. The essence of this charge was then incorporated into par. 5 of the amended conspiracy indictment.

> to wit, Local 819 International Brotherhood of Teamsters, would be paid to certain officers and employees of said labor organization as salary and expense allowances and would be reflected as such on the books and records of said labor organization while, in truth and in fact, the moneys so appropriated were and would be paid over to certain of the defendants and co-conspirators. [S. App. 16a].

At the trial, the evidence showed that the petitioner Scalza had been in the labor movement for 20 years, had never been convicted of a crime, and was married and had three sons. Tr. 2383, 1941. In January of 1961 he was hired as an organizer for the Teamsters Local. At that time the Teamsters Local had only about 150 members and desperately needed to enlarge its membership in order to survive. Tr. 1947.

In the meantime, the membership of the Independent Local, which was the successor to the Textile Local, was being decimated by raids engineered by other unions and needed the support and strength of a strong international, such as the Teamsters. Tr. 215, 216. And so in December of 1961 the Independent Local made overtures to the Teamsters Local to affiliate with it in order to obtain the benefit of the vast resources of the Teamsters international and thereby effectively resist the raiding forays of other unions. Tr. 1939-43, 1884-85.

In an effort to expand the membership of the Teamsters Local, petitioner Scalza went to its secretary-treasurer, Maurice O'Connor, and asked him if he would "help in the campaign he was about to wage on the membership of Local 77 [the Independent Local]." Tr. 1945, 1946. O'Connor agreed to assist in Scalza's campaign to achieve a merger with the Inde-

pendent Local. In January of 1961 Scalza and O'Connor on two different occasions addressed the executive board of the Independent Local in an attempt to convince the board members that "they could have more protection if they belonged to an international union" rather "than an independent union." Tr. 1945.

Additionally, in that month of January, petitioner Scalza was asked to attend a meeting at the Polyclinic Hospital in New York City, where he was told that before certain persons influential in the Independent Local would recommend such a merger they would have to be paid $210 a week.[3] Tr. 1946

The merger of the Independent Local with the Teamsters Local meant enlarging the membership of the latter by approximately 900 members. With the dues set at $4 per member, this merger would produce additional revenue to the Teamster Local of about $3600. Tr. 1951.

The petitioner Scalza and O'Connor then went back to a meeting of the seven-man executive board of the Teamsters Local to present their "case." Tr. 1945. After hearing Scalza and O'Connor, the board voted and authorized an increase of $20 each in Scalza's and O'Connor's weekly salaries, together with a weekly expense account of $50 to each of them; in addition, the employment of Scalza's son at a salary of $70 a week was authorized. These various amounts totalled $210 a week. Tr. 1953-55. There is no evidence and the Government has never claimed that these authorized adjustments in the salary and

[3] The meeting took place in the hospital room of Sol Cotliar, who was ill and confined to the hospital. Cotliar was one of alleged co-conspirators.

expense accounts were in any way unreasonable. And the evidence was uncontradicted that Scalza, O'Connor and Scalza's son worked full time for the Teamsters Local after these authorized adjustments were made. S. App. 69a.

The Government's version of this critical transaction concedes the union's authorization of the additional salary and expense items totalling $210 a week. In its brief (p. 12) to the Court of Appeals, the Government stated:

> It was, therefore, agreed [between Scalza and O'Connor] that the $210 commitment would be met by placing Scalza's son, Richard, on the payroll of the union at $70 a week; by voting both Scalza and O'Connor an expense account of $50 per week; and by increasing the salaries of O'Connor and Scalza by $20 each week, for a total of $210. It was also decided that the necessary salary and expense account adjustment be voted at an executive board meeting (T. 1953-55). Upon the formal ratification of the executive board, Scalza began delivering the $210 to Hyman each week (T. 1948-55). He continued to do so for a period of months (T. 185-86, 1960-63).

This acknowledgement was made even clearer in a subsequent portion of the Government's brief (pp. 24-25) in the court below:

> The fact that payments continued after O'Connor ceased to be an employee of the union, was a clear indication that the commitment [to pay $210 a week] was the obligation of the Union and not the personal obligation of Scalza and O'Connor, who were merely agents for the delivery of the sums embezzled and that title to these funds never passed to Scalza and O'Connor.

Thus the Government's theory of the case was that the embezzlement or taking took the form of payments

from the union to an outsider (Hyman), with Scalza and O'Connor being merely intermediaries.

The Government produced no evidence and made no allegation or claim that the $210 payment was not used for the union purpose of helping effectuate the merger of the Independent Local with the Teamsters Local. The indictment itself (S. App. 16a) charged only that "the moneys so appropriated were and would be paid over to certain of the defendants and co-conspirators"—without negativing the fact that the payments were in connection with the union merger.

All of the weekly $210 payments were made in a rather surreptitious fashion to Hyman, no part of them being retained for the personal use of Scalza or O'Connor. Hyman thereafter recommended to the Independent Local that it join the Teamster Local. Tr. 754. Upon Hyman's urging, the executive board of the Independent Local voted overwhelmingly to affiliate with the Teamsters Local and the merger was duly consummated. Tr. 764.

At the conclusion of the trial, the court charged the jury as to the contents of § 501(c) of the Landrum-Griffin Act and defined each of the crimes specified therein—embezzling, stealing, abstracting and converting. S. App. 85a-86a. But the instruction made no reference to any requirement that under any of those specified crimes the taking must be without the knowledge or consent or authorization of the organization or person from which the funds are taken.[4] S. App. 76a-

[4] Scalza's counsel specifically excepted to the failure to include in the definition of abstraction the requirement that it be without the knowledge or consent of the organization or person from which the funds are being abstracted, citing *United States* v. *Northway*, 120 U.S. 327, 334. S. App. 110a.

110a. Nor was any standard given the jury for determining what is or is not a legitimate union purpose in the use of union funds. The judge, however, did charge that:

> An essential element of each of the definitions stated is that the money, funds, property or other assets alleged to have been stolen, embezzled, abstracted or converted must have belonged to a labor organization and not to the one charged with misappropriation thereof. [S. App. 86a.]

Finally, near the conclusion of the charge, the judge instructed as follows:

> Section 501(c) of the Landrum-Griffin Act does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests. However, if funds charged on union books to either salary or expense accounts which are taken from the union for private, personal purposes and not expended in furtherance of the interests of the general union membership, or if union payrolls and salaries are falsified and manipulated so as to provide funds from the union treasury for non-union purposes, such conduct is unlawful and in violation of Section 501(c) of the Landrum-Griffin Act. [S. App. 97a.]

In the appeal from the petitioner's conviction, the Court of Appeals for the Second Circuit, commenting on the jury charge, held:

> The court did not say to the jury explicitly or by far-fetched inference that it would be a violation of section 501(c) as a matter of law if a union employee used his salary for his own private or personal purposes. The court made it abundantly

clear that section 501(c) "does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests." What is prohibited is the charging on the union books of false and fictitious items under the guise of legitimate salary or expense accounts.

REASONS FOR GRANTING THE WRIT

The decision below raises a critical and novel question as to the proper interpretation and application of § 501(c) of the Landrum-Griffin Act. The inherent importance of the question, combined with the substantial impact of the answer upon the internal operations of all labor organizations in the United States, justifies full review of the case by this Court.

The broad ruling of the court below that § 501(c) prohibits "the charging on the union books of false and fictitious items under the guise of legitimate salary and expense accounts" (p. 7a, *infra*) reflects, particularly in light of the facts of this case, a most questionable and danger-laden reading of § 501(c). That ruling stemmed from a record which, viewed most favorably to the Government, showed (1) a union, impoverished of members, engaged in a desperate effort to induce another local to amalgamate with it, (2) union approval, through executive board action, of additional personnel and of increased salaries and expense accounts for its officers in order to assist this effort to expand its membership, and (3) use by the officers of these authorized increments to make payments to certain other individuals thought to be influential in securing the consent of the other local to the proposed merger.

The statutory problem is whether this use by officers of such authorized salary and expense account increases in order to help achieve the union's goal of amalgamation constitutes the kind of action which § 501(c) was designed to outlaw. To label the ultimate payments made to others by the union officials as immoral or reprehensible in nature, or even as illegal under some law not here involved, contributes nothing to the solution of the § 501(c) problem. Section 501(c), by its own terms, is concerned solely with the union officer or employee "who embezzles, steals, or unlawfully and wilfully abstracts or coverts to his own use, or the use of another," any of the moneys or assets of the union which he serves.

This statutory language must be read and applied in light of the fact that the Landrum-Griffin Act, while imposing various limitations and sanctions on unions and their officers, was not intended by Congress as an open invitation to juries and judges to render their own uninhibited judgments as to the morality or even the legality of any and all union expenditures. Consistent with the carefully delineated proscription of specified practices, Congress intended the widest possible preservation of union practices and internal procedures. As has been said on another occasion by the Second Circuit, *Gurton* v. *Arons*, 339 F. 2d 371, 375 (C.A. 2):

> The provisions of the L.M.R.D.A. [Landrum-Griffin Act] were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operations of of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to

manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.

But the broad and confused reading given § 501(c) in this case invites the "officious intermeddling" in the internal affairs of unions which the *Gurton* decision condemned and permits indiscriminate speculation by juries into the bona fides of all union financial transactions. Without bothering to analyze the undisputed facts or their statutory implications, the court below apparently accepted the Government's theory of the case that the union purpose so dominated the transaction that the "commitment" to pay the $210 per week to Hyman "was the obligation of the union and not the personal obligation of Scalza and O'Connor . . . Scalza and O'Connor were merely agents for the delivery of the sums embezzled and . . . title to these funds never passed to Scalza and O'Connor."[5] Thus, under the court's holding, every payment or commitment by a union to a third person is a potential or real embezzlement, at least if the transaction is improperly entered on the union books in the form of salary or expense items. And such a payment is apparently an embezzlement even though the union's governing body author-

[5] Govt. Brief, p. 25, in Court of Appeals.

ized or approved the transaction and the bookkeeping techniques.[6]

No limitations or standards were imposed on the jury's inquiry into the bona fides of this union transaction. More particularly, the court below has in no way limited § 501(c) and the jury inquiry thereunder to those "false and fictitious" items which are entered (1) without the express authorization of the union itself and (2) without any real or arguable relationship to a legitimate union purpose.

Yet without such limitations, the whole thrust of § 501(c) is altered. It becomes a threat which Congress never intended, a threat to all unions and union officers that what some jury or judge may conceive to be a false or improper accounting procedure may result in an embezzlement or conversion conviction. Such a threat may well inhibit the pursuit of lawful and constitutional union objectives. In this very case, the evidence demonstrated that the Teamsters Local was seeking additional membership and amalgamation with the Independent Local. It was thereby pursuing a fundamental and protected right to organize and expand and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 of the Labor-Management Relations Act, 29 U.S.C. § 157.

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[6] Suppose, for example, that as a price for securing the amalgamation of the Independent Local Hyman requested that he be put on a pension from the Teamsters Local after the amalgamation, in light of his many years of service to the Independent Local. The Teamsters Local approves the request and "improperly" debits the pension payments to Scalza's expense account. Under the court's theory of § 501(c), there would appear to be an embezzlement by Scalza for the use of Hyman.

When a union engages in the pursuit of such basic rights and authorizes the expenditure of certain items to aid in that pursuit, courts must take care that § 501(c) or any other federal criminal statute is not so broadly interpreted as to inhibit those rights. Cf. *Smith* v. *California*, 361 U.S. 147, 155.[7] Properly interpreted and applied, the proscriptions of § 501(c) can be made effective without such an inhibitory effect. By limiting the concepts of embezzlement, stealing, abstracting and conversion to those takings that are unauthorized by the union and serve only private rather than union purposes, the inhibitory effect is removed.

Moreover, Congress has made plain the precise extent of its concern with improper financial transactions by unions and the remedies it believes are adequate to treat with such "false and fictitious" union accounts. Section 501(a) of the Landrum-Griffin Act provides certain fiduciary standards for union officers and agents in the administration of union finances; and violations of those standards are made the subject of damage suits and accountings pursuant to the provisions of § 501(b). In addition, Congress in Title II of the Act has created a comprehensive scheme for the reporting and review of union financial statements—including items entered as salaries, expense allowances and other "direct and indirect allowances." Sec. 201. Any false statement or representation, or any wilful concealment, in such reports subjects the

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[7] In the *Smith* case, this Court warned that obscenity statutes must be so framed and applied as not to have "a tendency to inhibit constitutionally protected expression." As was said in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433, "The threat of sanctions may deter . . . exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions."

union officials to criminal sanctions, including imprisonment up to one year. Sec. 209.[8]

To read § 501(c) as confined to unauthorized takings for purely private purposes is not only consistent with the general rule favoring strict construction of criminal statutes but is required if due respect is to be paid to all the interrelated provisions and titles of the Landrum-Griffin Act. See *Calhoon* v. *Harvey*, 379 U.S. 134, 139-140. Section 501(c) simply was not meant to be the equivalent of or a substitute for the financial standards imposed on unions and union officers by § 501(a) or § 201. And there is no practical or legal justification for expanding the interpretation of § 501(c) so as to overlap those other provisions. Cf. *Gilbert* v. *United States*, 370 U.S. 650, 658.

In other words, § 501(c) is a straight-forward embodiment of proscriptions that have always been a part of our general criminal jurisprudence—an outlawry of surreptitious, unauthorized takings of money or property of a person or organization for one's own private use, or the private use of another. The statutory concepts of embezzlement, stealing, abstracting and conversion all have long-standing meanings that possess that common feature of unauthorized takings for private usage. See *Moore* v. *United States*, 160 U.S. 268, 269-270; *Grin* v. *Shine*, 187 U.S. 181, 189; *Morissette* v. *United States*, 342 U.S. 246, 271-273;

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[8] The penalty for violation of § 501(c) includes imprisonment up to five years; violation of the conspiracy statute, 18 U.S.C. § 371, is also punishable by imprisonment up to five years. Petitioner in this case was sentenced to five years imprisonment. Thus the court below has in effect escalated the one-year offense specified by § 209 into a five-year penalty.

United States v. *Turley*, 352 U.S. 407, 411-413.[9] And when Congress enacted § 501(c) it was merely making federal offenses, insofar as union officers and employees are concerned, out of what has always been outlawed under state law, to wit, the unauthorized takings for private use which are encompassed by the specified crimes.[10] See also *United States* v. *Harmon*, 339 F. 2d 354, 357 (C.A. 6).

But when union moneys or assets are given to bona fide union officers or employees, for their own use or the use of others, *pursuant to union authorization and in accordance with some legitimate union purpose*, the very essence of those long established criminal concepts disappears. That vacuum is not filled by evidence of surreptitiousness in payment, or even impropriety in bookkeeping entries.

It should be noted, finally, that neither the issue presented nor the propriety of granting review is

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[9] In *United States* v. *Northway*, 120 U.S. 327, 334, this Court noted that, to constitute the crime of abstracting, "it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with intent to injure or defraud it . . ."

In *Grin* v. *Shine*, 187 U.S. 181, 189, it was said that "it is impossible for a person to embezzle the money of another without committing a fraud upon him."

[10] Senator Kennedy made it plain that § 501(c) does no more than make "embezzlement by any person of funds or assets of a labor organization a Federal crime." Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI, p. 1038.

Senator Goldwater pointed out that "Embezzlement of any kind is already a crime in every State and Territory of the United States, and there is no evidence that these local laws are not being properly enforced. This provision gives union members nothing they do not already have." *Ibid.*, p. 1014; see also p. 1079.

affected by the fact that this is a conspiracy conviction. The petitioner Scalza was tried and convicted on the theory that he was a member of a general conspiracy which had various objects, including the alleged taking of money from the Teamster Local treasury. But the only conceivable connection between Scalza and the alleged conspiracy was his activities with respect to the Teamster Local finances through his salary and expense account increases. Those are the activities that create the issue in this case; and if those activities do not constitute a crime under § 501(c) the verdict as respects the petitioner cannot stand.[11]

Certiorari should accordingly be granted to restore § 501(c) to its true, limited meaning. Only this Court's action can remove the threat to all labor unions imposed by the decision below. Only then can unions safely pursue their legitimate goals without fear that the propriety of their financial transactions will later be second-guessed in criminal proceedings that are not designed for that purpose.

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[11] If there be thought to be any other ground upon which the petitioner's conviction can be justified, the conviction clearly could not be sustained under the rule which "requires a verdict to be set aside in cases where the verdict is supportable on one ground but not on another and it is impossible to tell which ground the jury selected." *Yates* v. *United States*, 354 U.S. 298, 311-312. See also, *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 291-292; *Cramer* v. *United States*, 325 U.S. 1, 36, n. 45; *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284.

CONCLUSION

For these various reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 30, 1965

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 428—September Term, 1964.

(Argued May 3, 1965 Decided August 2, 1965.)

Docket No. 29384

UNITED STATES OF AMERICA, *Appellee*,

—against—

EDWARD BRILL, SOL COTLIAR, BURTON HYMAN and JOSEPH SCALZA, *Appellants*.

Before: MOORE, SMITH and HAYS, *Circuit Judges*.

Appeal by defendants, Burton Hyman, Sol Cotliar, Edward Brill and Joseph Scalza, from judgments of conviction entered in the Southern District of New York after a trial before George H. Boldt, *Judge*,* and a jury for conspiracy to violate section 501 (c), Title 29, United States Code.

Affirmed.

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* Of the Western District of Washington, sitting in the Southern District of New York by designation.

GERALD H. ABRAMS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, John E. Sprizzo, Assistant United States Attorney, of counsel), *for Appellee.*

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MOORE, *Circuit Judge*:

The defendants, Burt Hyman, Sol Cotliar, Edward Brill and Joseph Scalza appeal from judgments of conviction by a jury upon an indictment* charging them and other co-conspirators with conspiring to violate section 501(c) of Title 29, United States Code in that they embezzled, stole and converted to their own use and the use of others, funds of labor organizations, namely, Local 229, United Textile Workers of America and Local 819, International Brotherhood of Teamsters.

In general, the basis of the conspiracy was the abstraction of funds from the union treasuries by means of false vouchers and fictitious salary payments to persons who performed no services for the unions. These funds were

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* The indictment was filed on June 16, 1964, and superseded an indictment filed on October 24, 1963.

then wrongfully diverted to the use of the defendants and others.

Although the scheme had many ramifications, in essence, and as revealed by the bookkeeper, Joan Kane, it involved the issuance of false expense vouchers and fictitious salary checks to provide for an excess of $210 a week over the actual union expenses. The participation of the convicted defendants therein was $50 to Brill and $160 (delivered in two envelopes containing $100 and $60) to Cotliar. Hyman, a former officer of Local 229, directed transmission of the funds. Scalza was the president of Local 819. The merger of Local 77 (formerly Local 229) with Local 819 is of significance only in that the merger negotiations and its consummation required the perpetuation of the fraudulent scheme. Insofar as more specific facts are required in dealing with the errors alleged by the individual defendants they will be stated subsequently.

Cotliar—Sufficiency of the Evidence

Cotliar contends that the Government did not prove that he *knowingly* entered into or participated in the conspiracy and that he is a victim of guilt by association. Although there was testimony that for some fifteen months commencing in late 1959 Cotliar had been given envelopes which had been delivered by Kane to Levin (a former business partner of Cotliar), Cotliar argues "that the mere fact that he allegedly received some of the fruits of the conspiracy does not lead to any legitimate inference that he received it because he had a 'stake in the venture'." His conclusion is that without further proof the jury was required "to make any one of a number of inferences completely consistent with innocence." Cotliar's explanation of the adverse jury result is that it "came about through errors in the admission of evidence * * * and through the innuendo loaded questions consistently asked of witnesses throughout the trial."

The evidence claimed to have been erroneously admitted against Cotliar was primarily Scalza's grand jury testimony given on September 24, 1963. Cotliar argues that Scalza's grand jury testimony, and inferentially the adverse testimony of the other conspirators was inadmissible on the ground that the Government failed to present independent evidence to link him to the conspiracy. This argument is answered by Kane's testimony that she left envelopes for "Solly" and by Levin's testimony that Cotliar picked up these envelopes.

Cotliar argues that Scalza's testimony before the grand jury was inadmissible hearsay as against him since it was given after the conspiracy to divert union funds had been completed. Although Cotliar asserts that the conspiracy ended in mid-November 1962, there was evidence that payments were continued at least into early 1963. Nor was there any definite termination date placed by the conspirators upon the $210 monthly obligation. Admissibility, therefore, might well be based upon continuation of the conspiracy. However, it is unnecessary to invoke any particular theory because the defendant whose testimony—introduced through a reading of the grand jury minutes—is attacked as heresay actually took the stand to describe his version of the events. In so doing he subjected himself to cross-examination, thus removing any disadvantage Cotliar might have suffered from not being able to cross-examine in the grand jury room. Moreover, Scalza's testimony at trial covered much the same ground as his testimony before the grand jury and his answers did not deviate materially from those given to the grand jury. Scalza's testimony at trial, therefore, cannot be classed as a hearsay declaration made after termination of the main conspiracy or as concerned primarily with events which took place after the main conspiracy had terminated. That Cotliar's counsel elected not to question Scalza was an exercise of judgment on his part, although at variance with the decisions of counsel for the other three defendants who did cross-examine.

The jury was entitled from all the acts revealed by the testimony to determine whether Cotliar knowingly participated in the conspiracy to embezzle union funds. Was he merely the owner of a bookstore and the unwitting recipient of mysterious envelopes? Or was he more closely affiliated with the other defendants as might be inferred from his frequent appearance at union headquarters, his discussions as to union problems, the meeting with Scalza and Hyman in his hospital room where the "sale" of Local 77 was consummated and where continuing wrongful payments by officers of Local 819 were agreed upon, the undercover method of delivering the envelopes and his inquiries as to whether anything had been left for him? Furthermore, the jury might well have considered for inference purposes why after FBI investigation had commenced did Cotliar want to "get rid of this mess" and not "want any part of it". From these and other facts, the jury could have found in Cotliar's favor; it did not do so. Absent error in the admission or exclusion of testimony or error in the charge, its verdict must stand because it is not the function of the reviewing court to replace the jury's determination where properly admitted testimony would warrant the result reached.

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Levin was an important witness because it was he who testified that Kane gave him the envelopes which Hyman was sending to "Sol" (Cotliar) and which he, in turn, delivered to Cotliar. On the Government's direct examination, Levin was asked about his grand jury appearance and disclosed that he had invoked his rights under the Fifth Amendment and had refused to testify before that body. Cotliar's counsel thereupon moved for a mistrial which motion was denied. Subsequently, counsel on cross-examination brought out the fact that Levin had been threatened with indictment but had been told that he would not be indicted if he testified at trial for the Government. Cotliar

argues that the irresistible inference from this testimony is that Levin was guilty and knew of his guilt; therefore, his former business associate, Cotliar, to whom he delivered the envelopes, must also be guilty. Such inferences are always possible where a co-defendant pleads guilty and testifies for the Government. Under such circumstances it is usually standard trial procedure to seek to attack the witness' credibility by showing the advantage he hopes to receive by so doing. Likewise, if there be a criminal record, "it is usually proper and desirable that the party calling a witness with a criminal record should elicit such information on direct examination." *United States* v. *Freeman*, 302 F. 2d 347, 350 (2 Cir., 1962). The cases upon which Cotliar relies, *Grunewald* v. *United States*, 353 U. S. 391, 415-424 (1957) (*defendant's* use of the Fifth Amendment in prior grand jury testimony used to impeach his credibility at trial); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir., 1960), *cert. denied*, 366 U. S. 935 (1961) (*defendant's* use of the Fifth Amendment in prior testimony before a Congressional committee also used to impeach his testimony at trial); and *United States* v. *Tomaiolo*, 249 F. 2d 683 (2 Cir., 1959) (*defense witness'* use of Fifth Amendment in his prior testimony before grand jury used to impeach his credibility at trial), involve substantially different situations and do not support the proposition that facts affecting credibility of a friendly witness cannot be developed on direct examination within reasonable limits. Nor was the disclosure that Levin was testifying under a grant of immunity in any different category. There was no error in the admission of this testimony.

Scalza—The Charge

Scalza creates his two major appellate points out of a completely specious conception of one sentence of the court's charge. The court did not say to the jury explicitly or by far-fetched inference that it would be a violation of section 501(c) as a matter of law if a union employee used

his salary for his own private or personal purposes. The court made it abundantly clear that section 501(c) "does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests." What is prohibited is the charging on the union books of false and fictitious items under the guise of legitimate salary or expense accounts. No further answer is required to such a gross misconception and interpretation of a charge which clearly placed the essential elements of the crime before the jury.

The Motion for a Severance

Scalza's involvement stems from his employment in January 1961 as an organizer for Local 819. In July 1961 he became its president. In the merger negotiations in early 1962 designed to place the membership of Local 77 into Local 819, the condition was imposed of continuing the $210 a week payments after the merger. There was testimony that this was arranged by placing Scalza's son, Richard, on the union's payroll at $70 a week, authorizing $50 each to Scalza and O'Connor, then the secretary-treasurer of Local 819, as expenses and by increasing their salaries by $20 a week—a total of $210. This amount ($210) Scalza delivered to Hyman.

Although Scalza was only added as a defendant in the June 16, 1964 indictment, he was alleged in this indictment to have "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses" with his co-defendants within the meaning of Rule 8(b) of the Federal Rules of Criminal Procedure. The propriety of the trial court's denial of the motion for severance was confirmed by the sufficiency of the evidence introduced at trial which linked Scalza to the continuing conspiracy which was the subject of the indictment. *Schaeffer* v. *United States*, 362 U.S. 511, 514 (1962). There was no error in denying his motion for a severance.

The Demand for a Bill of Particulars

The decision upon the demand for a bill under the previous perjury indictment did not deprive the trial court of its right to exercise discretion upon the demand under the conspiracy indictment. No reversible error can be attributed to the denial of this motion.

Hyman

This appellant adopts all points raised by his co-appellant Cotliar (Points II and III) and the other co-appellants insofar as applicable. The same conclusions set forth in this opinion as to the alleged hearsay statements after the asserted termination of the conspiracy and the admission of the testimony of Levin apply with equal force as to Hyman.

Brill

Brill concedes that the proof discloses that he, as a union employee, participated in a scheme whereby persons who did not in fact work for the union were placed on the payroll, their checks endorsed and cashed by Kane and the proceeds delivered to one or more of the co-defendants. These payroll "dummies" were then discharged after twenty weeks so that they would be eligible for New York State unemployment insurance. Brill places his claim of reversible error upon an incident during the trial and upon an alleged defect in the charge.

The "currency" incident

This incident occurred when counsel for Hyman, desirous of obtaining a stipulation that an envelope delivered to Levin was "what is known as a regular size envelope" received a reply from the prosecutor, "Can we stipulate that it is about the size of currency?" A motion for a mistrial followed which was denied but the trial court struck the prosecutor's "currency" reply and instructed the jury to

disregard it. The ensuing colloquy, much out of the hearing of the jury, showed no prejudice on the part of the trial judge against Brill's (or the defendants') case. It was merely an effort to preserve courtroom decorum—an effort which often appears in retrospect to have greater appellate importance than during the heat of battle. As to the remark itself, the jury could not have been so naive and unfamiliar with American currency as not to be able to form its own opinion as to whether American bills would fit into the envelope in question. Whether or not this were so would have been fair argument to the jury by any of the parties. Nothing was, therefore, brought to the jury's attention that their own eyesight and common sense would not have revealed.

The Charge

Error in the charge is claimed because of the court's asserted failure to connect the elements of the crime of conspiracy with the elements of the crime specified in section 501(c). Brill concedes that the charge contained excellent discussions of elements of both crimes but contends that the court did not state that the jury must find beyond a reasonable doubt that "the object of the conspiracy was to commit the acts which constitute a violation of section 501(c)." The court first referred to the indictment as charging the defendants "with wilfully, knowingly and unlawfully conspiring to embezzle or convert to their own use or to the use of others in violation of section 501(c) funds or other assets of certain labor organizations ..." and that it alleged "that the object of the conspiracy was the violation of Section 501(c)." The court then specifically charged that the jury must find beyond a reasonable doubt that each defendant "knew of the existence and unlawful objective of the alleged conspiracy and that he had the specific intent to assist the conspiracy in attaining that objective." Section 501(c) so far as material was read to the jury thus informing it of the essential elements of the

crime. A fair reading of the charge leaves no doubt that the jury was adequately advised that they must find that the object of the conspiracy was to steal and embezzle union funds in violation of section 501(c).

The record is replete with evidence from which the jury could have satisfied itself beyond a reasonable doubt that these defendants were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible.

The judgments of conviction are affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 701

BURT HYMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY O. RAPHAEL,
Attorney for Petitioner,
770 Lexington Avenue,
New York, New York 10021

October 26, 1965

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	7
Appendix A—Opinion of the Court of Appeals	8

CITATIONS

Highway Truck Drivers and Helpers Local 107 v. *Cohen*, 182 F. Supp. 608 (E. D. Pa.), *aff'd*, 284 F. 2d 162 (3rd Cir. 1960), *cert. denied*, 365 U. S. 833 (1961)	6
Holton v. *McFarland*, 215 F. Supp. 372 (D. Alaska 1963)	6
Rappaport v. *International Association of Machinists*, 202 F. Supp. 235 (N. D. Ill. 1962)	6
United States v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, 341 U. S. 494 (1951)	5
United States v. *Gross*, 276 F. 2d 816, 821 (2d Cir.), *cert. denied*, 363 U. S. 831 (1960)	4
United States v. *Maloney*, 262 F. 2d 535, 537 (2d Cir. 1959)	4
United States v. *Persico*, 349 F. 2d 6, 11 (2d Cir. 1965)	5
United States v. *Tomaiolo*, 249 F. 2d 683, 692 (2d Cir. 1957)	5
Woxberg v. *United States*, 329 F. 2d 284, 293 (9th Cir.), *cert. denied*, 379 U. S. 823 (1964)	5

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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Burt Hyman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 2, 1965.

Opinions Below

There was no formal opinion of the District Court following the jury verdict on October 29, 1964. The opinion of the Circuit Court of Appeals has as yet not been reprinted in an official reporter. Annexed hereto in an Appendix A is a true copy of the opinion of the Court of Appeals.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 2, 1965. Rehearing was denied on September 1, 1965 and thereafter, this Court, by order of Mr. Justice John M. Harlan, on September 28, 1965, extended petitioner's time for filing the within application for a writ of certiorari to and including October 30, 1965. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. May the prosecution deliberately cause its witness, named as a co-conspirator, to testify of his assertion of a Fifth Amendment privilege before a Grand Jury until granted statutory immunity?

2. Does the Constitution permit prosecution witnesses to testify of acts allegedly in furtherance of a conspiracy to violate a statute not yet in existence?

Statutes Involved

Title 29, U.S.C., § 501:

> "(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. Pub. L. 86-257, Title V, § 501, Sept. 14, 1959, 73 Stat. 535."

Title 18, U.S.C., § 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> • • • • •
>
> June 25, 1948, c. 645, 62 Stat. 701."

Statement

Petitioner Burt Hyman was charged with having conspired to violate Title 29, United States Code, Section 501(c) in that he and six co-defendants allegedly embezzled funds of labor organizations. Sixteen others were named as co-conspirators, and testified for the prosecution. Following a jury verdict, petitioner was sentenced to five years imprisonment and fined the sum of $5,000.

In general, the gravamen of the conspiracy was the abstraction of moneys from two unions by means of false vouchers and fictitious salary payments (A10).*

During the three-week trial, one of these co-conspirators testified that petitioner, in 1957 and 1958, had hired two co-defendants and a number of co-conspirators to assist him as trustee, in the management of Local 229 (T 60-65). Other government witnesses also related incriminating conversations with petitioner prior to the enactment of this statute: Benfante (T 745-747, 749-750, 754); Sabater (T 855-857, 859-860, 875-882); Herbert (T 1030-1033, 1069-1070).

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* References are to pages in the stenographic transcript of the trial (T), and the opinion of the Circuit Court of Appeals included herein (A).

Finally, a co-conspirator, Levin, characterized by the Court of Appeals as an "important witness" (A13), testified that he received envelopes, presumably containing embezzled funds, with instructions that petitioner was sending these to another defendant (T 1772-1775). Prior to the introduction of this evidence, the prosecutor elicited testimony that the witness had originally refused to testify before a Grand Jury (T 1748-1750) and only spoke freely when he was granted immunity from prosecution (T 1754).

Reasons for Granting the Writ

I

In simplest possible terms, the issue before this Court is whether reference to the Fifth Amendment privilege and grant of immunity asserted by the government's witness obtained an unfair and incurable advantage for the prosecution?

It is clear that the prosecution deliberately introduced such testimony; its witness was neither recalcitrant nor uncertain, nor had the defense invited the inquiry. *United States* v. *Gross*, 276 F. 2d 816, 821 (2d Cir.), *cert. denied*, 363 U. S. 831 (1960).

The impact of such revelation, coming from a co-conspirator, was grossly prejudicial. When the government gratuitously informed the jury that its witness had remained silent until granted immunity, no member of the jury could have failed to believe Levin, and no cross-examination could have changed this predetermined opinion.

> "If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind." *United States* v. *Maloney*, 262 F. 2d 535, 537 (2d Cir. 1959).

Used in such a fashion, the Fifth Amendment becomes a weapon, rather than a shield.

If *United States* v. *Tomaiolo*, 249 F. 2d 683, 692 (2d Cir. 1957), precludes the introduction of such evidence to damage the reputation and prejudge a witness called by the defense, can there be any justification for permitting trial tactics which unnecessarily buttress the credibility of a government witness? If it is unfair to burden the defense with proving beyond a reasonable doubt that the government's witnesses are guilty of perjury, *United States* v. *Persico*, 349 F. 2d 6, 11 (2d Cir. 1965), then it is equally unfair to force them to overcome the inferences raised by the assertion of a claim of self-incrimination and subsequent grant of immunity.

II

There is no doubt that considerable authority supports the position that evidence may be introduced of a conspiracy to violate a statute before the date of its enactment. *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, 341 U. S. 494 (1951). Understandably, the passage of time and the reputation of the Circuit Judge have discouraged direct attacks on the doctrine. Yet, there is authority for a re-consideration of the entire issue.

Assuredly, a defendant may not be convicted of embezzlement and conversion of union funds prior to the passage of the Landrum-Griffin Act.

> "The Act could not make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law. To make the acts retroactively criminal would have constituted an *ex post facto* application of Section 501(c), and would be violative of Article I, § 9(3) of the United States Constitution." *Woxberg* v. *United States*, 329 F. 2d 284, 293 (9th Cir.), *cert. denied*, 379 U. S. 823 (1964).

Similarly, civil recovery has been denied wherein the acts alleged took place prior to the enactment of section 501(c). *Holton* v. *McFarland,* 215 F. Supp. 372 (D. Alaska 1963); *Highway Truck Drivers and Helpers Local 107* v. *Cohen,* 182 F. Supp. 608 (E. D. Pa), *aff'd,* 284 F. 2d 162 (3rd Cir. 1960), *cert. denied,* 365 U. S. 833 (1961); *Rappaport* v. *International Association of Machinists,* 202 F. Supp. 235 (N. D. Ill. 1962).

There is little reason to permit evidence of acts occurring before the passage of the statute merely because they are part of a so-called "conspiracy". There can be no logic in depriving a defendant of Constitutional protections because background may help a jury to understand the ramifications of an alleged plot. If a crime is as charged, it should be proven within the years when such conduct was criminal. It would be indeed unrealistic to afford protection from civil suit or from a charge directed to a wholly substantive violation, and to withdraw such protection because of supposed joint action. The vice of permitting evidence as to conspiratorial acts prior to the passage of the statute is at once apparent. Petitioner stands charged with having conspired to do that which he could not have been convicted of as an individual. Clearly, he could not have had the requisite intent to violate a law not yet in being, yet a parade of witnesses was permitted to testify to his acts at such time.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY O. RAPHAEL,
Attorney for Petitioner,
770 Lexington Avenue,
New York, New York 10021.

212 TE 2—7700

Of Counsel:

ROBERT E. SCHER.

October 26, 1965.

Exhibit A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 428—September Term, 1964.

(Argued May 3, 1965 Decided August 2, 1965.)

Docket No. 29384

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD BRILL, SOL COTLIAR, BURTON HYMAN and JOSEPH SCALZA,

Appellants.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal by defendants, Burton Hyman, Sol Cotliar, Edward Brill and Joseph Scalza, from judgments of conviction entered in the Southern District of New York after a trial before George H. Boldt, *Judge,** and a jury for

* Of the Western District of Washington, sitting in the Southern District of New York by designation.

conspiracy to violate section 501(c), Title 29, United States Code.

Affirmed.

GERALD H. ABRAMS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, John E. Sprizzo, Assistant United States Attorney, of counsel), *for Appellee.*

EDWARD CHERNEY, New York, N. Y. (Smart, McKay & Cherney, New York, N. Y., of counsel), *for Appellant, Edward Brill.*

ALBERT J. KRIEGER, New York, N. Y., *for Appellant, Sol Cotliar.*

GILBERT S. ROSENTHAL, New York, N. Y., *for Appellant, Burt Hyman.*

FREDERICK J. LUDWIG, New York, N. Y. (Sharf, Mackell & Hellenbrand, Kew Gardens, N. Y., of counsel), *for Appellant, Joseph Scalza.*

MOORE, *Circuit Judge*:

The defendants, Burt Hyman, Sol Cotliar, Edward Brill and Joseph Scalza appeal from judgments of conviction by a jury upon an indictment* charging them and other co-conspirators with conspiring to violate section 501(c) of Title 29, United States Code in that they embezzled, stole and converted to their own use and the use of others,

---

* The indictment was filed on June 16, 1964, and superseded an indictment filed on October 24, 1963.

funds of labor organizations, namely, Local 229, United Textile Workers of America and Local 819, International Brotherhood of Teamsters.

In general, the basis of the conspiracy was the abstraction of funds from the union treasuries by means of false vouchers and fictitious salary payments to persons who performed no services for the unions. These funds were then wrongfully diverted to the use of the defendants and others.

Although the scheme had many ramifications, in essence, and as revealed by the bookkeeper, Joan Kane, it involved the issuance of false expense vouchers and fictitious salary checks to provide for an excess of $210 a week over the actual union expenses. The participation of the convicted defendants therein was $50 to Brill and $160 (delivered in two envelopes containing $100 and $60) to Cotliar. Hyman, a former officer of Local 229, directed the transmission of the funds. Scalza was the president of Local 819. The merger of Local 77 (formerly Local 229) with Local 819 is of significance only in that the merger negotiations and its consummation required the perpetuation of the fraudulent scheme. Insofar as more specific facts are required in dealing with the errors alleged by the individual defendants they will be stated subsequently.

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Exhibit A.

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Scalza's involvement stems from his employment in January 1961 as an organizer for Local 819. In July 1961 he became its president. In the merger negotiations in early 1962 designed to place the membership of Local 77 into Local 819, the condition was imposed of continuing the $210 a week payments after the merger. There was

testimony that this was arranged by placing Scalza's son, Richard, on the union's payroll at $70 a week, authorizing $50 each to Scalza and O'Connor, then the secretary-treasurer of Local 819, as expenses and by increasing their salaries by $20 a week—a total of $210. This amount ($210) Scalza delivered to Hyman.

Although Scalza was only added as a defendant in the June 16, 1964 indictment, he was alleged in this indictment to have "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses" with his co-defendants within the meaning of Rule 8(b) of the Federal Rules of Criminal Procedure. The propriety of the trial court's denial of the motion for severance was confirmed by the sufficiency of the evidence introduced at trial which linked Scalza to the continuing conspiracy which was the subject of the indictment. *Schaeffer* v. *United States*. 362 U. S. 511, 514 (1962). There was no error in denying his motion for a severance.

The Demand for a Bill of Particulars

The decision upon the demand for a bill under the previous perjury indictment did not deprive the trial court of its right to exercise discretion upon the demand under the conspiracy indictment. No reversible error can be attributed to the denial of this motion.

Hyman

This appellant adopts all points raised by his co-appellant Cotliar (Points II and III) and the other co-appellants insofar as applicable. The same conclusions set forth in this opinion as to the alleged hearsay statements after the asserted termination of the conspiracy and the admission of the testimony of Levin apply with equal force as to Hyman.

Exhibit A.

Brill

Brill concedes that the proof discloses that he, as a union employee, participated in a scheme whereby persons who did not in fact work for the union were placed on the payroll, their checks endorsed and cashed by Kane and the proceeds delivered to one or more of the co-defendants. These payroll "dummies" were then discharged after twenty weeks so that they would be eligible for New York State unemployment insurance. Brill places his claim of reversible error upon an incident during the trial and upon an alleged defect in the charge.

The "currency" incident

This incident occurred when counsel for Hyman, desirous of obtaining a stipulation that an envelope delivered to Levin was "what is known as a regular size envelope" received a reply from the prosecutor, "Can we stipulate that it is about the size of currency?" A motion for a mistrial followed which was denied but the trial court struck the prosecutor's "currency" reply and instructed the jury to disregard it. The ensuing colloquy, much out of the hearing of the jury, showed no prejudice on the part of the trial judge against Brill's (or the defendants') case. It was merely an effort to preserve courtroom decorum—an effort which often appears in retrospect to have greater appellate importance than during the heat of battle. As to the remark itself, the jury could not have been so naive and unfamiliar with American currency as not to be able to form its own opinion as to whether American bills would fit into the envelope in question. Whether or not this were so would have been fair argument to the jury by any of the parties. Nothing was, therefore, brought to the jury's attention that their own eyesight and common sense would not have revealed.

Exhibit A.

The Charge

Error in the charge is claimed because of the court's asserted failure to connect the elements of the crime of conspiracy with the elements of the crime specified in section 501(c). Brill concedes that the charge contained excellent discussions of elements of both crimes but contends that the court did not state that the jury must find beyond a reasonable doubt that "the object of the conspiracy was to commit the acts which constitute a violation of section 501(c)." The court first referred to the indictment as charging the defendants "with wilfully, knowingly and unlawfully conspiring to embezzle or convert to their own use or to the use of others in violation of Section 501(c) funds or other assets of certain labor organizations . . ." and that it alleged "that the object of the conspiracy was the violation of Section 501(c)." The court then specifically charged that the jury must find beyond a reasonable doubt that each defendant "knew of the existence and unlawful objective of the alleged conspiracy and that he had the specific intent to assist the conspiracy in attaining that objective." Section 501(c) so far as material was read to the jury thus informing it of the essential elements of the crime. A fair reading of the charge leaves no doubt that the jury was adequately advised that they must find that the object of the conspiracy was to steal and embezzle union funds in violation of section 501(c).

The record is replete with evidence from which the jury could have satisfied itself beyond a reasonable doubt that these defendants were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible.

The judgments of conviction are affirmed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Highway Truck Drivers v. *Cohen*, 182 F. Supp. 608, affirmed, 284 F. 2d 162, certiorari denied, 365 U.S. 822 — 8

Morisette v. *United States*, 342 U.S. 246 — 9

United States v. *Harmon*, 339 F. 2d 354, certiorari denied, 380 U.S. 944 — 9

United States v. *Harrelson*, 223 F. Supp. 869 — 8

Statutes:

29 U.S.C. 501(a) — 2, 9

29 U.S.C. 501(c) — 1, 2, 3, 7, 9, 10

Miscellaneous:

H. Rep. No. 741, 86th Cong., 1st Sess. — 9

S. Rep. No. 187, 86th Cong., 1st Sess. — 9

791-752—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 350 F. 2d 171.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1965, and a petition for rehearing was denied on September 1, 1965. The petition for a writ of certiorari was filed on September 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to establish a conspiracy to violate 29 U.S.C. 501(c).

STATUTE INVOLVED

29 U.S.C. 501 provides as follows:

> (a) *Duties of officers; exculpatory provisions and resolutions void.* The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
>
> * * * * *
>
> (c) *Embezzlement of assets; penalty.* Any person who embezzles, steals, or unlawfully and

> willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and five co-defendants were convicted of conspiracy to violate 29 U.S.C. 501(c) (App. 15a–17a).[1] Petitioner was sentenced to five years' imprisonment and fined $5,000 (App. 119a–120a), and the court of appeals affirmed.

The indictment charged that petitioner conspired with various other persons to embezzle, steal and convert to their own and others' use the funds of a labor organization in New York City. The organization in question was a local of the United Textile Workers of America ("UTWA"), which later disaffiliated and operated as an independent local, and thereafter merged with a local of the International Brotherhood of Teamsters, of which petitioner was president. The pattern of conduct whereby funds were siphoned from the labor organization, though varying in details, was essentially the same both before and after the merger with petitioner's local; *i.e.*, the union's records were made to show that salaries and expenses were paid to

[1] "App." refers to the "Appendix for Appellant Scalza" filed in the court below. "Tr." refers to the transcript of trial in the district court.

certain union employees when, in fact, the amounts involved were paid to certain co-conspirators.

In 1957 the UTWA local was placed under the trusteeship of co-defendant Hyman, who employed co-defendant Brill as an organizer and co-defendant Cariello as bookkeeper (Tr. 59–62). Joan Kane, a government witness who was named as a co-conspirator but not as a defendant, was initially Cariello's assistant and assumed his duties as bookkeeper in September 1959.[1] Cariello explained to her that it was necessary that she make up her books in such a manner as to have $210 in cash left over each week. Of this sum $50 was to be paid to Brill and $100 and $60 cash, placed in separate envelopes, was to be taken to a bookstore on 57th Street and given to a man called "Rube" (Tr. 73–89). Reuben Levin, proprietor of the bookstore, testified that he received these envelopes and regularly turned them over to defendant Cotliar (Tr. 1772–1775). When Mrs. Kane later suggested to Cariello that, instead of manipulating the books, they issue checks payable to cash for these expenditures, he told her that such action would look even worse than what they were doing (Tr. 102).

Various devices were employed to create a weekly cash surplus. Persons were placed on the local's payroll who performed no service and received only a portion or, in some cases, none of their credited sal-

[1] During Cariello's tenure as bookkeeper, the union's records showed that one Herbert received $3,486.37 in 1958 and $668.40 in 1959 and that one Sabater received, as expenses, $1,698.37 in 1958 and $2,277.75 in 1959 (Govt. Ex. 454, 455). Both men testified that they did not actually receive these amounts (Tr. 879–881, 1036–1038).

aries (Tr. 103–121, 132–138). Others signed vouchers for expense money which they did not receive (Tr. 156–164, 862–883, 1030–1041, 1194–1250, 1466–1472, 1511–1513). The $210 payments were regularly delivered by different union personnel, sometimes to the bookstore, sometimes to an address on 23d Street, and sometimes to a public relations firm headed by Hyman, where delivery was made to Hyman or his partner (Tr. 82–89, 211–214, 892–895, 1200–1201, 1655–1657). When the cash surplus at the end of the week, achieved by the foregoing methods, exceeded $210 by a small amount, the excess would be placed in petty cash. If the excess were large, it would be turned over to Brill, who directed the affairs of the local after the termination of the trusteeship (Tr. 128).

In 1959, because of difficulties in meeting its financial obligations to the UTWA, the local disaffiliated and became an independent local. Thereafter, raids by other labor organizations reduced its membership by 1961 to about one thousand. To protect against these raids, Brill and other officers entered into negotiations for a merger with a small local affiliated with the Teamsters, headed by petitioner (Tr. 215–217, 219–221, 762–764, 1941, 1945). In January or February 1962 petitioner met in co-defendant Cotliar's hospital room with other co-defendants. At that time, Hyman offered to have the independent local merge with petitioner's Teamsters local if petitioner would agree to continue drawing $210 a week out of the union treasury, to be turned over to Hyman and Cotliar. Petitioner agreed (Tr. 218, 1895, 1946–1948). After the merger was ratified by the membership of the inde-

pendent local (Tr. 764–765), petitioner served as president of the combined organization.

At about this time, petitioner told Brill that he had bought the local "lock, stock and barrel", for $30,000 (Tr. 223). When Mrs. Kane asked petitioner whether it was true that he was paying cash for the local instead of the customary $210 a week, petitioner replied that it was true, that the weekly payments were "chicken feed" and that he had to have complete control (Tr. 227–229). In fact, however, the weekly payments continued. Hyman contradicted petitioner's version of the arrangement to Mrs. Kane and explained that petitioner wanted to make people think he had full control.

When O'Connor, the secretary-treasurer of the Teamsters local, first heard of the arrangement to pay $210 weekly, he told petitioner that it was impossible. Petitioner told O'Connor that $70 of the amount each week would be paid through each of them and that the remaining $70 weekly would come from petitioner's son, who would be placed on the payroll. Thereupon, petitioner and O'Connor obtained authorization from the local's executive board for increases in their expense allowances and for the employment of petitioner's son (Tr. 1953–1955). Petitioner assured O'Connor that after a few months he would be able, through his connections, to bring about a discontinuance of the weekly commitment (Tr. 1948, 1953–1955, 1961–1962). When O'Connor protested further, petitioner took him to see Hyman, who urged O'Connor to give the arrangement a thirty-day trial. Following this meeting, petitioner told O'Connor that Hyman was the

man who was receiving the $210 weekly (Tr. 1964–1966). The weekly payments continued at least until the early part of 1963 (Tr. 241–242).

When the vice-president of the local asked petitioner for additional expense money from the local's treasury, petitioner told him that this was impossible, as they had to pay out $210 a week to the persons from whom they had taken over the local. Petitioner said that he did not know how long they would have to continue these payments (Tr. 1895–1897). In the summer of 1962, O'Connor unsuccessfully attempted to force petitioner to discontinue the weekly payments by having the executive board reduce his own and petitioner's salaries and expense allowances and remove petitioner's son from the payroll (Tr. 2232–2238). When petitioner was reelected president of the local in 1963, he discharged O'Connor (Tr. 1898–1899).

ARGUMENT

Petitioner concedes that the evidence was sufficient to show a conspiracy to embezzle the funds of the labor organization in question prior to its merger with the local of which he was president (Pet. 4) and that, prior to such merger, persons influential in the management of the independent local agreed to recommend the merger only if they were paid the sum of $210 per week (Pet. 6). He appears to argue, however, that the payments after the merger do not violate 29 U.S.C. 501(c) on the grounds that (1) the executive board of the Teamsters local approved them, (2) he received no part of the payments himself, and (3) the payments were made for a legitimate union purpose.

The record shows no specific authorization by the executive board for the payments to Hyman and Cotliar. Prior to any executive board action, petitioner had told O'Connor that the sum would be made up by contributions of $70 apiece from them and by a further contribution of $70 by petitioner's son, who was to be placed on the payroll. While the board authorized the increased disbursements to petitioner and O'Connor and the salary for petitioner's son from which the weekly payments derived, there is no indication that the payments themselves—which continued to be made by concededly surreptitious means (Pet. 8)—were approved by the board. Moreover, nothing was done to acquaint the membership of the independent local (whose dues were drawn upon for a large portion of these payments) with petitioner's arrangement, and their approval of the merger was made in complete ignorance thereof. Even if a majority of the combined local had approved the payments, it is questionable whether this would have legitimized the expenditure. Cf. *Highway Truck Drivers* v. *Cohen*, 182 F. Supp. 608, 620 (E.D. Pa.), affirmed, 284 F. 2d 162 (C.A. 3), certiorari denied, 365 U.S. 833.

The fact that petitioner received no part of the $210 himself does not exonerate him. Section 501(c) expressly proscribes misappropriation to one's own use "or the use of another." See *United States* v. *Harrelson*, 223 F. Supp. 869, 870 (E. D. Mich.). Nor is it dispositive that petitioner deemed the payments necessary to effect the merger. The allegedly beneficial purpose of the weekly disbursements was a mat-

ter for the jury to consider.[2] As the court below found, "The record is replete with evidence from which the jury could have satisfied itself beyond a reasonable doubt that these defendants were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible" (Pet. App. 10a).

Section 501(c) is a comprehensive provision establishing criminal sanctions against those who misappropriate the assets of a labor organization in violation of their fiduciary obligations, as set forth in Section 501(a). See *United States* v. *Harmon*, 339 F. 2d 354, 356-358 (C.A. 6), certiorari denied, 380 U.S. 944. As the language of the statute indicates, Congress intended that it be interpreted and applied so as to secure a high degree of fiduciary responsibility on the part of representatives of labor organizations who occupy positions of trust. See H. Rep. No. 741, 86th Cong., 1st Sess., pp. 9, 44-45; S. Rep. No. 187, 86th Cong., 1st Sess., pp. 12, 42; cf. *Morisette* v.

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[2] The jury was properly instructed to consider the purpose of the disbursements (App. 97a):

> Section 501(c) of the Landrum-Griffin Act does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit *nor does it prohibit the use of bona fide expense accounts in furtherance of union interests.* However, if funds charged on union books to either salary or expense accounts which are *taken from the union for private, personal purposes and not expended in furtherance of the interests of the general union membership*, or if union payrolls and salaries are falsified and manipulated so as to provide funds from the union treasury *for non-union purposes*, such conduct is unlawful and in violation of Section 501(c) of the Landrum-Griffin Act. [Emphasis supplied.]

United States, 342 U.S. 246, 271–272. The evidence fully establishes, we submit, that petitioner's activities contravened both the letter and the spirit of Section 501(c).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner,*

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY BRIEF

The appropriateness of the grant of certiorari in this case is emphasized by the arguments advanced by the Brief for the United States in Opposition:

1. The statement (Opp., p. 9) that "Section 501(c) is a comprehensive provision establishing criminal sanctions against those who misappropriate the assets

of a labor organization in violation of their fiduciary obligations, as set forth in Section 501(a)" represents the erroneous interpretation and extension of Section 501(c) which underlies the decision below and which warrants review by this Court.

The Government would thereby equate the two provisions, rewriting Section 501(c) to provide criminal sanctions for each and every violation of the fiduicary duties covered by Section 501(a). But Congress has not made such an equation. When Congress did want to encompass the fiduciary obligations of Section 501(a) within the ambit of some other section it exhibited its intent in unmistakable fashion—i.e., Section 501(b), which provides for a damage or accounting action by union members whenever any union officer or agent "is alleged to have violated the duties declared in subsection (a) of this section." The failure to include such an express adoption in Section 501(c) of the duties declared in Section 501(a) is conclusive evidence of a difference in coverage between the two sections.

While the language of Section 501(c) is concededly broad, covering "almost every kind of a taking, whether by larceny, theft, embezzlement or conversion," *United States* v. *Harmon*, 339 F. 2d 354, 357 (C.A. 6),[1] it is plain that Section 501(a) is even broader. The latter provision (see Opp., p. 2) imposes upon union officers and agents a high degree of

[1] The *Harmon* decision, cited by the Government (Opp., p. 9), in no way seeks to equate the provisions of Section 501(a) with the criminal sanctions of Section 501(c); it merely makes the point that the crimes specified in Section 501(c) are broadly defined within the limits of that section. See also *Morissette* v. *United States*, 342 U.S. 246, 271-272.

fiduciary or trust obligations with respect to union assets and conflicting interests. Many such obligations may be violated, such as making otherwise authorized expenditures contrary to some union by-law, without involving the criminal concepts of embezzlement. In short, not every violation of a fiduciary duty is an embezzlement.

Thus the attempt here made to convert Section 501(c) into the criminal equivalent of Section 501(a) deserves the most careful scrutiny by this Court in order to insure that the legislative pattern is not unduly disturbed or expanded. The danger is that the court below has created a criminal sanction for a Section 501(a) violation in a situation where Congress intended only a civil remedy under Section 501(b).

2. The Government's concession (Opp., p. 8) that the union's executive board here authorized the additional payments in question raises in critical form the question whether there can be a criminal embezzlement, within the meaning of Section 501(c), where such payments are authorized and are used for an allegedly union purpose.

The Government's reference (Opp., p. 8) to the lack of specific union authorization for payments to Hyman or Cotliar and to the failure to acquaint the membership of the local with the arrangement[2] impliedly

[2] The Government's statement (Opp., p. 8) that even if a majority of the membership approved the payments it would be "questionable whether this would have legitimized the expenditure" is relevant only to an argument that such approval would not justify a violation of a fiduciary duty imposed by Section 501(a). The case cited for the statement, *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608, 620 (E.D. Pa.), involved a civil action under Section 501(b) for a violation of Section 501(a).

recognizes that such detailed authorizations take the authorized payments out of the embezzlement concept, although a violation of a fiduciary duty might still exist. But the authorization that was made here by the union executive board would likewise deprive the payments of that surreptitiousness, lack of authority and stealth which are the hallmarks of illegal takings and embezzlements. Such payments conceivably could constitute a violation of the officers' fiduciary duties under Section 501(a), but they cannot fall into the embezzlement category when authorization is concededly present.[3]

Significantly, the Government does not deny that the authorized payments were devoted to what the petitioner at least conceived to be a union purpose of achieving a merger. It contents itself with the unsupported statement that it is not "dispositive that petitioner deemed the payments necessary to effect the merger." Opp., p. 8. But in a criminal prosecution, where a defendant's intent is critical, why should not petitioner's view of the purposes to which he put the money be dispositive? That question only augments the need for review and exploration by this Court.

Moreover, if the opinion of union officials as to the needs of the union be deemed irrelevant, who is to determine the bona fides of the union purpose and what standards are to be utilized? The Government merely

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[3] Section 501(c) "deals with a situation wherein moneys are taken when there is no authority to do so." Duker, Fiduciary Responsibility of Union Officials, in Slovenko, ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959 (1961), at p. 527.

says that it "was a matter for the jury to consider." Opp., pp. 8-9. But unless the jury is to be given carte blanche to reexamine and second guess the bona fides of the union's self-interests, some intelligent and workable criteria must be established. None such appears in the instructions relied upon by the Government. Opp., p. 9, fn. 3. The jury was told in most general terms that Section 501(c) does not prohibit the use of bona fide expense accounts "in furtherance of union interests" and that it is unlawful to use union payrolls and salaries "for non-union purposes." No attempt was made to define the meaning and scope of bona fide union purposes or interests; no word of guidance was said in terms of the conceded authorization by the union executive board, or the union's interest in the merger, or the petitioner's belief that the expenditures were in accordance with that interest.

In short, the jury was allowed to speculate freely and without limit about the special interests, problems or functions of the union. Therein lies the grave threat to union independence in pursuit of legitimate objectives. And therein lies the obvious need for review of the decision below. That need is in no way diluted by the Government's emphasis (Opp., p. 9) upon the lower court's statement that the defendants here "were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible." No amount of alleged reprehensibleness or brazenness or other unflattering characterizations can justify a judicial misreading and misapplication of the plain words of a criminal statute. See *Viereck* v. *United States,* 318 U.S. 236, 243.

For these reasons, supplementing those in the petition, a writ of certiorari should issue.

Respectfully submitted,

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November 12, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 701

BURT HYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and four of five co-defendants were convicted of conspiracy to violate 29 U.S.C. 501(c).[2] Peti-

[1] "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

795-003—65

tioner was sentenced to five years' imprisonment and fined $5,000 (Tr. 2709).[1] The court of appeals affirmed (Pet. App. 8–17; 350 F. 2d 171).

The details of the conspiracy are set forth in the government's brief in opposition to the petition for certiorari filed by co-defendant Scalza (No. 632, pp. 3–7) and will not be repeated here. Briefly, petitioner and others were shown to have systematically converted funds of a local of the United Textile Workers of America by having the local's records reflect salaries and expenses that were not in fact paid as shown, but, instead, were used to create a weekly cash surplus of $210 which was regularly turned over to petitioner and two co-defendants. The weekly siphoning of the local's funds began shortly after petitioner, an organization director and vice-president of UTWA, was appointed trustee of the local in 1957, and continued at least until the early part of 1963 (Tr. 241–242). The payments were delivered by different union employees either to a bookstore operated by Reuben Levin, to petitioner's office, or to another office with which petitioner was associated (Tr. 82–89, 211–214, 892–895, 1200–1201, 1655–1657).

1. There is no merit in petitioner's contention (Pet. 4) that the prosecution "obtained an unfair and incurable advantage" from a government witness' reference to the Fifth Amendment privilege and his assertion of a grant of immunity. When

[1] "Tr." refers to the sixteen-volume trial transcript filed with this Court by co-defendant Scalza in connection with his petition for certiorari (No. 632). That petition raises issues entirely different from those involved here.

called to testify for the government, Reuben Levin was asked, "On your initial appearance before the grand jury, did you testify fully and freely?" (Tr. 1749). Levin replied, "I answered questions with the general answer that I refused to testify on the grounds of the Fifth Amendment" (Tr. 1750). The motion for a mistrial thereupon made at sidebar by counsel for co-defendant Cotliar was denied, the trial court noting that the witness did not have to answer as he did and that there had been no misconduct on the part of the prosecution. The witness then testified that he had received an immunity from prosecution under the Labor-Management Reporting and Disclosure Act of 1959. Cotliar's counsel objected to this testimony on the ground that the jury might get the impression that Levin was granted immunity by the grand jury. In denying this objection, the court offered to render a clarifying instruction, if requested (Tr. 1757, 1759). The only instructions on this subject requested by defense counsel, however, were to the effect that Levin was under no grant of immunity whatsoever, and these the court properly refused to give. In his testimony, Levin's only mention of petitioner was his statement that, in 1959, the local's bookkeeper had given him an envelope at his bookstore, stating that "Burt [petitioner] had sent this for Sol [Cotliar]" (Tr. 1772).

The fact that a witness had refused to testify before the grand jury until granted immunity—like the fact that he had pleaded guilty—has a bearing on the witness's credibility, and the government is

plainly entitled to elicit it on direct examination rather than leave it to be brought out by the defense.[2]

As in *United States* v. *Freeman*, 302 F. 2d 347 (C.A. 2), certiorari denied, 375 U.S. 958, in which the court held it proper for the prosecution to bring out a witness' criminal record on direct examination, the information elicited here had "clear relevance", and the failure to disclose it might well "have subjected the prosecution to criticism" (302 F. 2d at 350). The court's discussion in *United States* v. *Aronson*, 319 F. 2d 48, 51 (C.A. 2), certiorari denied, 375 U.S. 920, is apposite here:

> In practically every criminal prosecution, the government's principal witness or witnesses are drawn from the ranks of co-defendants, co-conspirators, or participants in the allegedly unlawful enterprise. Often they have pleaded guilty before trial. And so here. * * * The prosecutor called Kimball and, adhering to the time-honored and approved practice, asked him if he had ever been convicted of a crime. * * * Counsel on direct examination usually adopt the policy of bringing out such adverse facts as they know will be developed on cross-examination. Failure to disclose would then be characterized as an intent to conceal.
>
> Needless to say, a subject so common to criminal trials has been passed upon by many appellate courts so that there is no longer any uncertainty as to the law.

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[2] Indeed, Levin was extensively cross-examined by counsel for co-defendant Cothar concerning the grant of immunity (Tr. 1914-1922).

The cases relied upon by petitioner are not in point. *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2), and *United States* v. *Gross*, 276 F. 2d 816 (C.A. 2), certiorari denied, 363 U.S. 831, involved the prejudicial use of a prior claim of the privilege against self-incrimination to impeach a defense witness and the defendant, respectively. In those cases, the court held that the assertion of the privilege was not inconsistent with the witnesses' trial testimony and that the probative value of the prior claim of privilege was outweighed by the possibility that the evidence would be misused by the jury. As the court below correctly observed, these decisions "do not support the proposition that facts affecting credibility of a friendly witness cannot be developed on direct examination within reasonable limits" (Pet. App. 14).

In any event, Levin's testimony formed an insignificant part of the evidence of petitioner's criminal conduct. The single sentence in Levin's testimony relating to petitioner is surplusage, since ample other testimony showed petitioner to have been not just a participant, but the chief promoter of the unlawful conspiracy (Tr. 209–216, 235–237, 241–242, 257–258, 659–660, 675, 754–755, 844–845, 874–884, 890, 910, 1031–1037, 1205–1206, 1473, 1528–1649 1672–1674, 1720, 1964–1967, 1975–1977, 2206–2226, 2414–2420, 2442–2447). See *Carter* v. *United States*, 281 F. 2d 640 (C.A.D.C.), certiorari denied, 364 U.S. 880.

2. Petitioner rightly concedes (Pet. 5) that there is considerable authority for the proposition that evidence of events antedating the enactment of a

statute is admissible in a prosecution for conspiracy to violate that statute. Such evidence may be relevant to show how the conspiracy came into being and its mode of operations (*United States* v. *Witt*, 215 F. 2d 580 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States*, 348 U.S. 887), to demonstrate a course of conduct (*United States* v. *Heike*, 227 U.S. 131), to show knowledge or intent (*United States* v. *Lightfoot*, 228 F. 2d 861 (C.A. 7), reversed on other grounds, 355 U.S. 2), or to indicate the purpose and character of the conspiracy (*United Mine Workers* v. *Pennington*, 381 U.S. 657, 660–661, 670, n. 3). In the present case, the prestatutory evidence was relevant for all these purposes. As stated by Judge Learned Hand in *United States* v. *Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494, "* * * it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed."

In addition to the evidence that petitioner participated in defrauding the union before the enactment of the statute which made his acts a crime, the prosecution amply connected petitioner with the conspiracy which existed after September 14, 1959. It is only for his conduct on and after that date that petitioner was brought to trial and found guilty (see the court's explicit instructions, Tr. 2608–2612).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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February 2, 1966.

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PETITION FOR REHEARING

Petitioner respectfully requests a rehearing of the order of this Court dated January 17, 1966, denying the petition for writ of certiorari, to the end that the petition be granted upon such reconsideration. As grounds for rehearing, petitioner states as follows:

The sole question presented in the petition for writ of certiorari was whether the use by a union officer of

union-authorized increases in salary and expense accounts for payment to others in connection with union merger negotiations constitutes an embezzlement, stealing, abstracting or conversion within the meaning of § 501(c) of the Landrum-Griffin Act.

But the sharpness of that question may have been blunted in the certiorari proceedings by the Government's insistence (Opp., pp. 3-4, 7, 9) that petitioner's conduct was but a part of a single conspiracy, an overall pattern of siphoning union funds to certain co-conspirators. The fact is, however, that petitioner's part in the alleged conspiracy—which gives rise to the above question—was completely separate and distinct from the remainder of the asserted plot. Nearly three-fourths of the trial testimony concerned other defendants who at different times and in different ways siphoned-off funds of other locals, using fradulent expense vouchers and payroll dummies. Those activities in no way involved the petitioner; they related to union locals, to periods of time and to techniques of embezzlement which in no way implicated the petitioner Scalza.

So separate and distinct was petitioner's role that the original indictment made no mention whatever of the petitioner or of his Teamsters Local. Petitioner became involved only after the indictment was later amended by adding a new paragraph charging that, as a part of the single conspiracy, petitioner in his capacity as an officer of the Teamsters Local had been paid moneys from that Local's treasury in the form of salary and expense allowances; these moneys were alleged to have been paid over to certain defendants and co-conspirators. The testimony showed that these activities occurred subsequent to 1961 in connection

with merger negotiations between the Teamsters Local and the Independent Local and that the salary and expense allowances in question had been all duly authorized by the executive board of the Teamsters Local. There was no allegation and no proof that these activities were in any way related to the actions of the other defendants in embezzling funds from the Textile Local or the Independent Local during the earlier period of 1957-1961.

Such a complete separation of offenses within the sweep of a single alleged conspiracy brings into operation the rule of *McElroy* v. *United States,* 164 U.S. 76, 81. Pursuant to a statute substantially similar to the present Criminal Rule 8(b),[1] the Court there held impermissible the consolidation for trial of two indictments, one charging five defendants for assault and arson occurring on May 1 and the other indictment charging three of the defendants with a separate arson occurring on April 16. In reply to the Government's contention that the defendants were not prejudiced by the consolidation, the Court stated:

> " . . . we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

> are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute, and did not rest in mere discretion."

In other words, as was said by the Fourth Circuit in *Ingram* v. *United States,* 272 F.2d 567, 569-570:

> "Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. The error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials'."

The answer of the court below to this problem was to assert, without substantiation, that there was evidence linking petitioner to the continuing conspiracy and to cite this Court's decision in *Schaffer* v. *United States,* 362 U.S. 511, 514. The denial of petitioner's motion for a severance was thus held to be proper. But unlike the *Schaffer* series of interstate transportations of stolen goods, as to each of which there was a common

group of defendants, the alleged embezzlements in the instant case were unrelated in time, personnel or method. Whatever may have been alleged in the indictment by way of petitioner having participated in the same series of acts constituting the offense, the proof at the trial established the separateness of petitioner's activities. See *Kotteakos* v. *United States,* 328 U.S. 750, 773. And that separateness is further demonstrated by the fact that the statutory issue as to the legality of petitioner's activities, the issue which was presented in the petition for writ of certiorari, was not available to any other defendant involved in the other transactions.

Thus, once the separateness and uniqueness of petitioner's transactions can be appreciated, the question presented in the petition for writ of certiorari assumes a position above and apart from the remainder of the alleged conspiracy. That the Government was able to defend its case before this Court by reference to the overall and unconnected actions of the co-conspirators is but another instance of the disabilities attaching to mass conspiracy trials in which disassociated offenses are lumped together. Such a practice not only prejudices jury consideration but hobbles and confuses appellate consideration of what are truly separable issues.

Considered in its proper and separate context, the question as to the correct interpretation of § 501(c) of the Landrum-Griffin Act is one worthy of this Court's consideration. The Government has not denied its importance. Indeed, as petitioner's reply brief noted, the Government's equation of § 501(c) with the broader fiduciary provisions of § 501(a) only adds to the importance of the question and to the need for definitive clarification by this Court.

CONCLUSION

For these reasons, the order denying certiorari should be vacated and the petition for writ of certiorari granted.

Respectfully submitted,

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February 2, 1966.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

HERALD PRICE FAHRINGER

RICHARD LIPSITZ

EUGENE GRESSMAN